BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. AIR CANADA, a Canadian Corporation, Respondent. CAROLINE MESSIH-ZEMAITIS, Complainant.	Case No. E200809-R-0120-00-pe C 09-10-001 11-07-P DECISION ON RECONSIDERATION

Having unanimously denied both respondent Air Canada's and the Department of Fair Employment and Housing's Petitions for Reconsideration, the Commission this date hereby orders as follows:

1. The Commission vacates its original decision number 11-04-P in this case.

2. The Commission *nunc pro tunc* redacts the following sentence from pages 17-18 in finding of fact 94 of the decision: "Dr. Slonim noted that Zemaitis was depressed, both by her physical condition and the fact that her injury had cost Zemaitis her job."

3. The Commission corrects the following typographical errors in the proposed decision. On page 25, line two, the first sentence of that paragraph should read: "The DFEH asserts that Air Canada failed to provide Zemaitis reasonable accommodation." On page 28, second paragraph, line three should read: "workers which failed adequately to address long-term disabled employees; 3) did not have. . . ."

With the corrections noted above, the Commission affirms its April 7, 2011 adoption of the attached Proposed Decision as the Commission's final decision in this matter and reaffirms that it designates the decision as precedential. (Gov. Code, §§ 12935, subd. (a), 12972, subd. (a); Cal. Code Regs., tit. 2, § 7435, subd. (a).)

Chairman George Woolverton recused himself and did not participate in the deliberation or decision in this case or in the reconsideration decision.

Commissioner Stuart Leviton's dissent follows the Proposed Decision.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondent, and complainant.

DATED: July 14, 2011

FAIR EMPLOYMENT AND HOUSING COMMISSION

PATRICIA PEREZ	LINDA NG
KRISTINA RASPE	

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Administrative Law Judge Ann M. Noel heard this matter on behalf of the Fair Employment and Housing Commission on February 16-18, April 20-22, June 8 and 28, 2010, in Los Angeles, California. Phoebe P. Liu, Senior Staff Counsel, represented the Department of Fair Employment and Housing (DFEH). Philip C. Semprevivo, Jr., Esq., and Elaine N. Chou, Esq., of Biedermann, Reif, Hoenig & Ruff, LLC, represented respondent Air Canada. Complainant Caroline Messih-Zemaitis and Air Canada representative Michel LeBlanc were present throughout the hearing.

Both parties timely filed closing briefs on September 2, 2010, and the matter was submitted on that date.

After consideration of the entire record, the administrative law judge makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On July17, 2008, complainant Caroline Messih Zemaitis (Zemaitis or complainant) filed a written, verified complaint with the DFEH against her former employer, Air Canada. The complaint alleged that from September 12, 2007, through December 20, 2007, Air Canada failed to engage Zemaitis in the interactive process, denied her reasonable accommodation, refused to let her bid on a shift at her workplace, and terminated her

employment because of her physical disability, a back injury, and her sex, female. The complaint alleged that this conduct violated the Fair Employment and Housing Act (FEHA or Act). (Gov. Code, § 12900 et seq.)

2. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On July 16, 2009, Phyllis W. Cheng, in her official capacity as Director of the DFEH, issued an accusation against respondent Air Canada, a Canadian corporation (Air Canada or respondent). The accusation alleged that Air Canada discriminated against Zemaitis on the basis of perceived or actual physical disabilities, spinal and knee injuries and carpal tunnel syndrome, in violation of the FEHA. The accusation alleged that, after Zemaitis sustained on-the-job injuries, affecting her spine, knees and wrists, she took a recuperative leave. When her doctors cleared her to return to work with modified work duties, Air Canada refused to reinstate her, engage in the interactive process or provide reasonable accommodation and instead, terminated her employment. The accusation also alleged that Air Canada failed to take all reasonable steps to prevent discrimination from occurring. The DFEH asserted that this conduct violated, respectively, Government Code section 12940, subdivisions (a), (n), (m), and (k). The DFEH sought an order of back pay, benefits, out-of-pocket expenses, reinstatement or front pay in lieu of reinstatement, compensatory damages for emotional distress, an administrative fine, and a variety of affirmative relief.

3. At all relevant times, respondent Air Canada, a Canadian corporation, was an international airline and provider of scheduled passenger and cargo services in Canada and to over 170 destinations on five continents, including the Los Angeles International Airport ("LAX") in Los Angeles, California. Air Canada employed more than 100 employees in California. Air Canada was an "employer" within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (a), (k) (m), and (n).

4. In December 1993, Air Canada hired Zemaitis as a Customer Service Agent at the LAX passenger terminal.

Job Duties for Air Canada Customer Service Agents and Warehousemen

5. Air Canada's Customer Service Agents located at its air terminals assisted passengers with ticketing and baggage, including at the LAX air terminal. At all relevant times, the Air Canada Customer Service Agent position required agents regularly to lift baggage from the customer check-in counter to a luggage conveyor belt behind the counter, up to 100 bags per day. When Customer Service Agents were first hired, Air Canada showed them an instructional video about the proper way to lift heavy objects.

6. Air Canada also employed Customer Service Agents at its various cargo facilities to handle air freight clerical work. These jobs were referred to as "Customer Service Agent - Cargo."

7. Prior to 1991, Customer Service Agent - Cargo positions throughout Air Canada's system also performed duties in Air Canada's warehouses, lifting and moving air freight. In 1991, Air Canada created a "Warehouseman" position[1] at a lower classification and pay grade than its Customer Service Agents, transferring the physical, heavy lifting job duties of the Customer Service Agent - Cargo to the Warehousemen who worked exclusively in Air Canada's warehouses. Air Canada classified its Customer Service Agents, both at its air terminals and at its cargo facilities, as "J03s," while Warehousemen were classified as "J02s," with less pay and responsibilities than Customer Service Agents. At both its air terminals and its air cargo facilities, Air Canada also employed Lead Customer Service Agents, who supervised Customer Service Agents. At the air cargo facilities, the Lead Customer Service Agent also supervised Warehousemen. This position was classified as "J05" and paid more than the "J03" position.

8. Notwithstanding this 1991 reclassification, the job description for the Customer Service Agents position listed Warehouseman duties along with clerical duties. Whether Customer Service Agents in cargo facilities were required to continue to perform Warehouseman functions was a source of controversy between Air Canada and its Customer Service Agent - Cargo employees.

9. Since 1979, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") has represented the United States-based fleet and passenger service employees of Air Canada, including IBT Local Union #986 (Local 986), covering LAX Air Canada employees. At all relevant times, IBT's and Air Canada's labor relations were governed by a collective bargaining agreement (CBA or contract), negotiated in 1999 and in effect through the date of hearing.

10. The "Letter of Agreement No. 20" appended to the Air Canada – IBT contract, dated September 2, 1999, stated that, in settlement of a grievance filed by Air Canada's Customer Service Agents at the John F. Kennedy (JFK) airport cargo facility, agents there would no longer be required to perform warehouseman duties. Customer Service Agents at other Air Canada cargo facilities, including at LAX, cited this Letter of Agreement as validating their claim that it was unlawful under the CBA to require them to perform warehouseman duties. Air Canada's management, however, cited the same document as indicating that only at JFK were Air Canada's cargo agents allowed to forego warehouseman duties.

11. The Customer Service Agent – Cargo position job duties at LAX were clerical, with the primary duty to process cargo for shipment on Air Canada's fleet of planes through the company's computer accounting system. Customer Service Agents in the cargo facility could work in one of the following positions: import-export, accounting, front counter, bookings or vacation relief for other employees. A Customer Service Agent working at the

[1] To avoid confusion, this decision utilizes the job title used by Air Canada, Warehouseman, rather than a gender neutral term, such as "Warehouse Worker" or "Warehouse Employee."

import-export position compared information listed on the shipment received with information inputted into the computer, and filed the appropriate paperwork with the United States Customs Office. This required driving to the Customs Office, the only task outside the cargo facility. The accounting Customer Service Agent performed accounting functions, closed out airway bills every month, made bookings, ordered supplies, and retrieved the office mail. The front counter Customer Service Agent assisted customers who were dropping off and picking up freight items, processed payments, and prepared airway bills on the computer. The bookings Customer Service Agent answered the phone and made air freight reservations for customers. The vacation relief Customer Service Agent filled in for other air cargo employees who were on vacation or ill. Customer Service Agents worked inside in an office setting, with air conditioning and heating.

12. At all relevant times, Air Canada's LAX Warehousemen accepted and delivered cargo, checked shipment paperwork, and assisted the Customer Service Agents with investigating damaged or incomplete shipments. Warehousemen built up and broke down pallets; loaded and unloaded trucks as well as unit load devices (ULDs) – the specialized cargo containers designed for aircraft; stored cargo in the warehouse; and drove company vehicles, including forklifts. Warehousemen worked exclusively in the warehouse, a separate building adjacent to the cargo facility, without air conditioning or heating. Warehousemen did not work inside the cargo facility.

13. The Customer Service Agent – Cargo and Warehouseman positions had identical minimum qualifications. Air Canada required employees in these positions to be able to use the company's automated cargo tracking and accounting system, wear the company uniform and conform to company grooming standards, possess a valid driver's license, operate company vehicles and machinery, sit or stand for extended periods of time, lift 70 pounds unaided, and maintain an acceptable attendance record. While the listed qualifications for each position specified ability to lift up to 70 pounds unaided, in practice, Customer Service Agents – Cargo were never required to lift 70 pounds without assistance.

14. Air Canada provided new Customer Service Agents at the cargo facility at LAX with training regarding the individual clerical job duties of its different positions. They were not provided with training on Warehousemen duties. Though both positions' job descriptions stated that one duty was to "physically handle Cargo/Mail/Comat [company materials] manually or by machine (e.g., fork lift)," the only forklift training given to the LAX Customer Service Agents was a safety lecture.

15. The job description for a Customer Service Agent - Cargo position listed one of the "special requirements" that agents must wear safety shoes (steel-tipped boots) while on duty. Air Canada required Customer Service Agent in the cargo facility to purchase the boots but Air Canada did not require agents working inside the cargo facility to wear the boots and agents objected to buying the boots because they never wore them. Warehousemen wore weight belts and gloves to perform their functions; Customer Service Agents did not.

16. When air cargo customers dropped off cargo to be shipped, unless the cargo was very light, Customer Service Agents did not physically handle it, but they prepared the necessary paperwork to ship the freight. Instead, the Customer Service Agent left the cargo handling for a Warehouseman either by instructing air cargo customers to drop off their freight directly to the adjacent warehouse for the warehouseman to take or by calling a warehousemen to assist in moving the cargo from the cargo facility office to the warehouse. Customer Service Agents had discretion whether they chose either to handle merchandise such as dogs weighing 20 pounds or more or to call a Warehouseman to transport the animal or other item.

17. Under the Air Canada – IBT contract, Customer Service Agents in the cargo facility could bid on different shifts, with different job duties, based on their desired hours and days off. Shifts were bid in order of seniority. Agents bid on certain days and times, and different functions of the Customer Service Agent – Cargo job corresponded to each shift schedule, such as the accounting or front counter position. The most senior agents could opt not to bid on the vacation relief shift. The bidding process took place twice per year approximately two weeks before the schedule was to go into effect.

18. Air Canada maintained three schedules: one for Customer Service Agents, one for Lead Customer Service Agents, and one for Warehousemen. Customer Service Agents could only bid on shifts on the customer service agent schedule. However, Customer Service Agents who had been promoted from Warehousemen could pick up available warehouse shifts. When working as Warehouseman on a shift that had been voluntarily selected, a Customer Service Agent was expected to perform the duties customary to the Warehouseman position.

19. The work day was divided into several shifts/time slots – morning, evening, and two different starting times in between – and specific positions were assigned to specific time slots. The duties for the time slot bid on would not change day-to-day (with the exception of import-export, which shared the same time slot), but agents were encouraged to rotate work assignments. Agents often helped each other with work assignments, particularly if the office was busy or short-staffed. No customer service agents were explicitly assigned to the warehouse, but on a few occasions Manager of Cargo Operations Cindy Cichy required an agent working the vacation relief shift to work in the warehouse.

Zemaitis's Job and Medical History at Air Canada

20. Zemaitis is five foot three inches tall with small bone structure. In 1996, Zemaitis injured her low back at work at the LAX terminal while attempting with another employee to lift a 300 pound paraplegic customer from the customer's personal wheelchair to a smaller airport wheelchair and then to an airplane seat. Zemaitis had intense pain from that injury for three months and periodic low back pain thereafter. Zemaitis resumed her full working duties, managing her pain with over-the-counter pain relievers, such as Motrin.

21. In 1999, while at work, Zemaitis fell down some stairs and injured her right knee. There was no fracture. Zemaitis did not miss any time from work and continued her full working duties. She experienced right knee pain occasionally thereafter. Zemaitis took Motrin for her pain.

22. In 1999, Zemaitis was in a car accident while on a lunch break and injured her neck. She returned to full work duties. Thereafter, she experienced some residual soreness to her neck. Zemaitis took Motrin for her pain.

23. In 2002, Air Canada promoted Zemaitis to the Lead Customer Service Agent airport position, a "J05" classification, with higher pay and more responsibilities than a "J03." In 2003, Air Canada laterally transferred Zemaitis to work as a Concierge working solely with elite, VIP clients. Her classification remained a J05.

24. In 2004, Zemaitis transferred to work at Air Canada's air cargo facility as a Customer Service Agent – Cargo, taking a pay cut and a lower job classification, from J-05 to J-03, to do so. Three Customer Service Agent – Cargo employees working there, Javier Beardsley, Linda Shipke, and John O'Neill, all told Zemaitis that the Customer Service Agent – Cargo position was a desk job, involving office work only. Zemaitis accepted the demotion with lower pay and job status because she valued the opportunity for a desk job. Similarly, another long-term Customer Service Agent employee, Jaime Cordero, accepted a demotion from aircraft services coordinator at the airport, a "J0-5" position, to work as a Customer Service Agent at the LAX cargo facility. Neither Zemaitis nor Cordero would have accepted the demotion if they had been told that it also involved physical labor in the warehouse performing Warehousemen duties.

25. Zemaitis's direct supervisor at the LAX cargo facility was Cindy Cichy. Cichy was the Manager of Cargo Operations for Air Canada for California, Hawaii, Phoenix and Las Vegas, working out of an office at the LAX cargo facility. At the time of hearing, she had worked for Air Canada for more than nine years, always in management positions.

26. While a Customer Service Agent at the cargo facility, Zemaitis did the full range of Customer Service Agent - Cargo duties, answering telephones, typing, processing air freight paperwork, and making reservations for air cargo. The job entailed prolonged sitting, with some walking and standing. When filing, Zemaitis did some bending, stooping, squatting and overhead reaching. The overhead reaching caused Zemaitis problems with her shoulder and neck and so, utilizing a ladder, she moved the files to a lower shelf which solved the problem. The job also required Zemaitis to use her hands repetitively to type, file and answer telephones. This caused occasionally carpal tunnel problems for Zemaitis with her right wrist. She missed no work because of wrist pain, however.

27. In late 2004, Zemaitis bid on a six month vacation relief shift, relieving other Customer Service Agents in the cargo facility. In late 2004, Cichy assigned Zemaitis to work in the warehouse for several days. Zemaitis objected that this work violated the terms of the Air Canada – IBT contract, as the duties she was assigned should be performed by a

Warehouseman, not a Customer Service Agent - Cargo. Cichy insisted that Air Canada's job description for Customer Service Agent - Cargo included warehouseman duties. Zemaitis thereafter traded most of her days for this shift to another Warehouseman, but did work in the warehouse for two days, doing computer work. Cichy did not require Zemaitis to lift cargo or to perform any heavy labor nor did she reprimand Zemaitis for trading her assigned days. Thereafter, Zemaitis resumed her usual Customer Service Agent - Cargo duties.

28. On January 10, 2005, Cichy again assigned Zemaitis to the warehouse to work for an absent warehouseman. Zemaitis once more protested that the job was an illegal "cross utilization" of duties, violating the union contract. Cichy insisted that she had to do the job. Zemaitis complied, because she did not "want to cause trouble." For four days, Zemaitis worked in the warehouse loading numerous mail packages weighing 20-30 pounds each into a unit load device container. Zemaitis injured her back while loading these packages. Zemaitis mentioned to Cichy that she had injured her back but nonetheless continued working.

29. Zemaitis's back pain did not subside. Within a week of the injury, Zemaitis visited Mary Trumpe, D.C., a chiropractor.

30. In March 2005, Zemaitis reported the injury to Air Canada. Zemaitis did not report it earlier because she thought the pain would go away on its own. After two months of pain, however, she decided to inform Air Canada and filed a workers' compensation claim. AIG, Air Canada's workers' compensation insurance carrier, provided Michel LeBlanc, Air Canada's Employee Service Manager, with a copy of the claim. LeBlanc handled human resources, including disability and workers' compensation claims, for all Air Canada's United States-based employees. LeBlanc was based in Tampa, Florida.

31. On March 15, 2005, Pravin K. Muniyappa, M.D., an internist, examined Zemaitis and diagnosed that she had a lumbosacral strain. Dr. Muniyappa recommended work restrictions of pushing, pulling and lifting limited to 10 pounds and minimal crawling, kneeling, squatting, bending or twisting until reevaluation. Zemaitis gave Dr. Muniyappa's note to Cichy.

32. On March 18, 2005, Zemaitis supplied Cichy with a return-to-work form, entitled "Work Status and Capabilities Form & Release: Medical Provider's Statement," filled out by Dr. Muniyappa. The form provided: no frequent lifting or carrying over 10 pounds; no more than two hours at a time for sitting, standing, walking and driving; no standing or walking for more than four hours total each day; no pushing or pulling using Zemaitis's hands; and no bending, squatting, crawling, reaching or twisting.

33. Zemaitis discussed her medical restrictions with Cichy. They agreed that the restrictions did not prevent Zemaitis from performing her Customer Service Agent cargo facility job and Zemaitis resumed her normal job duties. From March 18, 2005, until September 2006, Zemaitis successfully performed all of the stations of the Customer Service Agent - Cargo position. She did not again work in the warehouse. As needed, Zemaitis at

times used assistive devices, such as a heating pad and a back brace and traded duties with her co-workers when she was in pain, but otherwise managed to perform the full range of her duties. During this time, she had intermittent back pain, occasional trouble gripping with her hands in the morning and occasional knee pain when the weather changed. Zemaitis managed her pain with Motrin and continued to work.

34. A year after seeing Dr. Muniyappa, Zemaitis was examined by Gil Tepper, M.D., an orthopedic surgeon, on March 15, 2006. Dr. Tepper issued a "Primary Treating Physician's Permanent and Stationary Report," which rated Zemaitis with a "total whole person impairment" of 12 percent, finding that Zemaitis had a disc protrusion at her lumbar L4-5 and L5-S1 disks and dynamic instability at her L-S1 disc, with spondylolisthesis of eight millimeters. He noted that Zemaitis reported that she continued to experience ongoing pain from this injury. Dr. Tepper placed work restrictions on Zemaitis of no heavy work which contemplated a loss of 25% pre-injury capacity for performing standing, stooping, lifting, pushing, pulling, climbing and any comparable physical effort. Zemaitis continued to work and to perform successfully all aspects of her Customer Service Agent position.

35. In July 2006, Zemaitis learned that she was pregnant. She was "ecstatic" because she and her husband had waited for 11 years, until they were financially secure, before trying to have a baby. Zemaitis was 39 years old.

36. The pregnancy was extremely painful for Zemaitis because the weight of the baby strained Zemaitis' injured back. Zemaitis continued to work full-time, performing all Customer Service Agent - Cargo duties.

37. On September 5, 2006, Rodney Ebrahimian, M.D., an orthopedic surgeon, examined Zemaitis. Dr. Ebrahimian diagnosed Zemaitis to have cervical, thoracic and lumbar spine sprain/strain and disc protrusions from her January 2005 accident, aggravated by the weight of her pregnancy. Dr. Ebrahimian recommended temporary total disability until after Zemaitis gave birth when she could begin medical treatments for her back. Zemaitis notified Air Canada of Dr. Ebrahimian's recommendation and submitted all necessary paperwork to them. Zemaitis went out on a disability leave as of September 5, 2006.

38. On January 7, 2007, Zemaitis gave birth two months prematurely to a healthy baby girl, Diana. Zemaitis was very happy, describing giving birth to her daughter as the happiest day of her life. After giving birth, Zemaitis went to traction, exercise and chiropractic therapy with Timothy Bullock, D.C., a chiropractor, for two to three months. Zemaitis took Motrin and Tylenol and rubbed ointment on her back to alleviate her pain.

39. Shortly after giving birth, Zemaitis had difficulty moving and lifting objects away from her body. She improved slowly. By the summer of 2007, Zemaitis's physical condition had improved greatly and by August 2007, she no longer needed additional chiropractic treatments. Zemaitis continued to update Air Canada on her physical condition.

40. By September 2007, Zemaitis felt well enough to return to work. By then, she was doing housework without taking breaks, was standing straight and was completely mobile. Zemaitis was able to lift her daughter, who then weighed 19 pounds.

41. On September 12, 2007, Dr. Ebrahimian examined Zemaitis and discussed her job duties and her physical capabilities. Zemaitis reported to Dr. Ebrahimian that she had intermittent back pain, some morning stiffness in her hands, and occasional knee pain when the weather changed. The same day, Dr. Ebrahimian issued a Primary Treating Physician's Orthopedic Permanent and Stationary Report where he rated Zemaitis's disability as permanent and stationary and at 16 percent (8% cervical, 8% lumbar). Dr. Ebrahimian noted that Zemaitis's symptoms for her lumbar and cervical spine included muscle guarding or spasms, asymmetric loss of range of motion and non-verifiable radicular complaints. He diagnosed cervical, thoracic and lumbar spine sprain/strain, disc protrusions in the cervical and lumbar spine, mild neuroforaminal stenosis, right shoulder impingement, right and left knee sprain/strain with evidence of mild chondromalacia patella on the right knee, and right carpal tunnel syndrome.

42. That same date, Dr. Ebrahimian released Zemaitis to return to work as of September 13, 2007, with restrictions. His return to work note stated that Zemaitis's diagnosis was "L/S HNP" and "C/S HNP," that is, lumbar and cervical herniated nucleus pulposus (herniated or slipped disks) and that the medications that she was taking were Tylenol and Motrin. Dr. Ebrahimian listed her restrictions as: no lifting over 15 pounds, no repetitive forceful pushing or pulling, no squatting or kneeling on knees, no repetitive finger and wrist movements, no repetitive overhead shoulder range of motion and no very heavy work. Zemaitis did not feel that these restrictions would prevent her from doing her job. The release also stated in the doctor's handwriting, "Awaiting AME Dr. Pechman to be R/S," because this appointment needed to be rescheduled. Dr. Ebrahimian had noted in his Permanent and Stationary report that Zemaitis was scheduled to see David Pechman, M.D. for an Agreed Medical Examination on September 4, 2007, but the appointment was canceled and a new date had yet to be scheduled.

43. The same day, Zemaitis notified Air Canada of Dr. Ebrahimian's return to work release, both by facsimile and email. Her email to Cichy stated that Zemaitis would like to use any paid or unpaid family leave or maternity leave benefits to which she was entitled and thereafter return to work. Zemaitis asked Cichy to present her return to work authorization to the proper party and to advise Zemaitis regarding what she needed to do to return to work.

44. Cichy received both Zemaitis's facsimile and email on September 12, 2007, and immediately forwarded the email to her boss, James Fisher, Manager of Cargo Operations for the United States and the Caribbean, Michel LeBlanc, Air Canada's Employee Service Manager, and John Beveridge, Air Canada's Director of Labor Relations, who was based in Toronto, Canada. Cichy's forwarded message to Fisher, LeBlanc and Beveridge retyped the doctor's work restrictions for Zemaitis and the doctor's note, changing it to "Awaiting AME Dr. Pechman to be RLS." Cichy asked in the email, "How does she think she is released?"

45. No one from Air Canada responded either to Zemaitis or to her workers' compensation attorney, Arman Moheban, Esq., to discuss Zemaitis's return to work, to ascertain whether she was released to return to work, to clarify Dr. Ebrahimian's note or to reschedule the Dr. Pechman appointment.

46. On September 13, 2007, Zemaitis returned to LAX cargo ready to work. Cichy told Zemaitis that she could not come back to work because of her work restrictions. Cichy also told Zemaitis that she was awaiting guidance on what to do from Air Canada's Human Resources and she would contact Zemaitis when she heard from them. Cichy did not ask for supporting medical documentation from Zemaitis or her doctor to clarify what the release meant, nor did Cichy discuss reasonable accommodation possibilities with Zemaitis on that date or anytime thereafter.

47. Zemaitis felt humiliated and scared when Cichy sent her home. Zemaitis's husband, Paulus Zemaitis, observed that his wife was distraught because she did not understand why Air Canada had barred her from returning to work. Zemaitis left a message seeking assistance for her IBT Cargo shop steward, Bill Kanter.

48. In 2007, Air Canada had a disability discrimination policy in effect which was available on Air Canada's internal website. Air Canada also had a Harassment Awareness for Managers, Manager's Toolkit which contained Air Canada's reasonable accommodations policy and instructed managers on how to handle disability claims. This policy directed managers to treat requests for accommodation seriously, to look for, and to present to employees needing accommodation, one or more reasonable accommodations, and to document with hard evidence if the employee could not be accommodated because of undue hardship. The policy stated that the goal should be to find a reasonable accommodation that balanced the competing interest of all the parties, protecting the "equality rights" of the employee to participate in the workplace.

49. Air Canada also maintained an "Employee Transitional Duty and Safe Return to Work Program," which provided for modified work for industrially-injured disabled employees needing accommodation who would be returning to full, unrestricted duty within 90 days. The program materials directed managers to give returning employees an "Alternate/Modified Work Form" to complete. No one from Air Canada gave Zemaitis this form to complete.

50. Air Canada had an "Occupational Health Assessment Policy" which stated that employees in occupations with safety sensitive or heavy physical demands returning from leaves of absences of over 180 days needed to undergo an occupational health assessment upon return to work, subject to Air Canada's occupational health services' direction. Although Cichy believed that the Customer Service Agent - Cargo was a safety sensitive, physically demanding position, Air Canada did not give Zemaitis an occupational health assessment when Zemaitis attempted to return to work.

51. On September 14, 2007, Zemaitis send Cichy a follow-up email requesting that Air Canada contact her about her job status and include her in an upcoming bid for work shifts. The email asked Cichy to notify Zemaitis of Zemaitis's job status as soon as possible so that she could finalize her application for paid family leave. Zemaitis indicated that she would be willing to take her paid family leave in shorter periods, to meet Air Canada's business needs. Cichy did not respond to the email.

52. The same day, Cichy forwarded Zemaitis's email to Beveridge and LeBlanc, both of whom received it, but also did not respond to Zemaitis. Cichy asked LeBlanc to follow up with AIG, Air Canada's workers' compensation carrier.

53. After receiving Zemaitis's forwarded September 14, 2007 email, Michel LeBlanc asked Cichy to follow up with Tony Glossen, at Hewitt, Air Canada's outside personnel vendor handling its workers' compensation claims, to determine Zemaitis's work restrictions, giving Glossen's telephone number to Cichy. Cichy responded via email that "we need someone to follow up." Cichy also stated, "[Zemaitis] cannot just return to work with all these restrictions," that Air Canada did not have a release "from all doctors," and that Zemaitis had a workers' compensation action against Air Canada/AIG pending. Cichy asked for Glossen's email address. Cichy never contacted Glossen or anyone else at Hewitt.

54. On September 15, 2007, LeBlanc asked Cichy via email to join a conference call with him and a Hewitt representative. In the September 15, 2007 email, LeBlanc stated: "I agree with you that she cannot come back if she has restrictions that you cannot accommodate. The attorney [representing Zemaitis in her workers' compensation matter] does not dictate when she returns to work, you do." The Hewitt representative never contacted LeBlanc to confirm Zemaitis's workers' compensation status or work restrictions and no telephonic meeting ever took place.

55. On September 20, 2007, Zemaitis called Jaime Cordero, the IBT's LAX airport chief shop steward, seeking assistance to return to work. Cordero responded that the IBT Cargo shop steward, Bill Kanter would look into the situation and call her back. Zemaitis had several conversations with Kanter regarding why Air Canada would not let her return to work. Zemaitis asked Kanter why Cichy had not called Zemaitis and why Air Canada would not return her to work. Kanter told her that Cichy was "still checking" on Zemaitis's status, but that Air Canada management did not believe that Zemaitis could do her job, giving as an example that management did not believe that Zemaitis could answer the telephone because of past carpal tunnel syndrome symptoms. Zemaitis responded that she could always use a headset. Kanter suggested that she take paid family leave and that by the end of that leave, perhaps Air Canada's remaining concerns would be sorted out.

56. On October 4, 2007, Zemaitis notified Air Canada that she was taking family leave backdated from September 13, 2007, to October 26, 2007.

57. By October 5, 2007, Cichy, LeBlanc, and Beveridge had all concluded that Zemaitis could not return to work with her work restrictions and were discussing, via email,

the form of the letter to send her to inform her of this. Beveridge had reviewed Dr. Ebrahimian's September 12, 2007 release and the Customer Service Agent - Cargo job description and had spoken once by telephone with Air Canada's Occupational Health Services Department director, Dr. Ed Bekeris, for an opinion on Zemaitis's fitness for the agent position. Reviewing the Customer Service Agent - Cargo job description, with the inclusion of Warehouseman duties, Beveridge reported that Dr. Bekeris had opined that with Zemaitis's restrictions, it was "unlikely" she would be able to perform, as these "limitations were inconsistent with the functional requirements." No one from Air Canada examined Zemaitis or reviewed any other medical documents. Dr. Bekeris did not examine or speak with Zemaitis. Dr. Bekeris did not testify at hearing.

58. On October 6, 2007, Zemaitis sent Cichy an email which reiterated that Zemaitis had been released to return to work on September 12, 2007, had been sent home by Cichy when Zemaitis had come to work on September 13, 2007, and had yet to hear back from Cichy about her job status. The email informed Cichy that Zemaitis was now taking family leave from September 14, 2007, to October 26, 2007, and expected to be returned to work on October 27, 2007. Zemaitis requested that Cichy immediately send Zemaitis written acknowledgement of her status and return to work. Zemaitis copied Beveridge, Cordero and Kanter. Zemaitis heard nothing from Cichy, Beveridge or her union stewards.

59. On October 7, 2007, Kanter called Zemaitis to relay that Cichy had informed him that Air Canada's personnel was mailing Zemaitis a letter. He did not know what the letter would say.

60. On October 10, 2007, AIG sent LeBlanc a letter confirming that Zemaitis had a lifting restriction of 20 pounds on a permanent basis.

61. On October 11, 2007, Zemaitis filed a union grievance asserting Air Canada was refusing to allow her to participate in the upcoming bid for work shifts. Cichy denied the grievance the same day. No hearing was held on the grievance denial. No one from Air Canada contacted Zemaitis to discuss Air Canada's decision.

62. On October 11, 2007, Air Canada sent Zemaitis a letter signed by Cichy which stated that AIG had informed Air Canada that Zemaitis had reached permanent and stationary status and that based on Zemaitis's disability, she would not be able to return to work as a Customer Service Agent. The letter gave Zemaitis two choices to pursue: either to request an unpaid medical leave of absence for up to two years or to elect to terminate her employment. Zemaitis would accrue no pension credits while on leave, and she would be responsible for all medical benefits. According to the union contract, reinstatement within a two year period was only possible if there were vacancies in her work category and seniority district. If she did not return to work within two years, she forfeited her seniority and Air Canada could terminate her.

63. On October 12, 2007, Zemaitis wrote a letter to Cichy rejecting the options proposed by Air Canada. Zemaitis asked Air Canada to meet with her and IBT to discuss its

concerns about her ability to perform her job and to see what the company could do to get her back to work. Also on October 12, 2007, Zemaitis wrote to IBT's business agent, Clacy Griswold and the union attorney, Debra Goldberg, Esq., requesting assistance from the union to set up a meeting with Air Canada.

64. Cichy received Zemaitis's October 12, 2007 letter but ignored it. Cichy did not contact Zemaitis or the union to arrange a meeting. No one else from Air Canada contacted Zemaitis.

65. On October 17, 2007, Zemaitis sent another letter and email to Cichy, again rejecting both options proposed by Air Canada and again requesting a meeting to discuss how Air Canada could help her get back to work. Cichy forwarded the communication to LeBlanc and Beveridge. Neither Cichy nor LeBlanc nor Beveridge contacted either Zemaitis or her union regarding this communication. Beveridge told Cichy: "Whether [Zemaitis] likes the options or not is not within her prerogative. You are simply providing her with her options as per the collective bargaining agreement. No meeting or disclosure of information is available through this process. She has to select an option or it will be a default selection which she won't like."

66. On October 24, 2007, IBT requested that Air Canada have a neutral physician examine Zemaitis and render a decision regarding her fitness for the Customer Service Agent – Cargo position. On November 8, 2007, Air Canada refused the request, stating that an examination was unnecessary since there was no dispute between Air Canada and Zemaitis about her medical documentation. From that medical documentation, Air Canada believed that Zemaitis had a series of continuing disabilities that rendered her unable to perform the physical requirements of the Customer Service Agent - Cargo position. Air Canada pointed to the CBA as providing the only two options for Zemaitis: unpaid medical leave of up to two years or self-termination.

67. At dates unspecified in the record, John Beveridge discussed with IBT's Clacy Griswold the union's request for an independent medical examination and the option under the CBA allowing Zemaitis to take a two year medical leave. Beveridge and Griswold also discussed the timing of an Air Canada-IBT "Systems Board" hearing to discuss pending grievances, including Zemaitis's, but this hearing was never held because of scheduling conflicts. Air Canada did not offer to meet with the union or Zemaitis to discuss her disability and did not offer any reasonable accommodations that would have helped Zemaitis do her job. As of the first day of hearing in this matter, no arbitration hearing had been held on either grievance filed by Zemaitis.

68. On October 27, 2007, Zemaitis reported to work at Air Canada's cargo facility. The employees there were surprised to see her. The Lead Customer Service Agent, Carlos Lopez, asked Zemaitis why she was there and Zemaitis told him that she was returning to work. Zemaitis asked Lopez if Cichy had put her back on the schedule. Lopez told her that Cichy had not. Lopez told Zemaitis to go home. Zemaitis retrieved her personal belongings from her locker and went home. Lopez agreed to ask Cichy to call

Zemaitis to let her know her job status. Neither Cichy nor anyone else from Air Canada ever contacted Zemaitis.

69. On October 27, 2007, Zemaitis filed a second grievance against Air Canada for effectively terminating her without cause and requesting immediate restoration of her job. On October 30, 2007, Cichy denied Zemaitis's grievance without explanation. Cichy did not contact Zemaitis to discuss the denial.

70. In November and December 2007, Cichy, LeBlanc and Beveridge internally prepared to terminate Zemaitis's employment. During this time, Air Canada never met directly with Zemaitis or with the union as Zemaitis's representative to discuss reasonable accommodations. Air Canada ignored all of Zemaitis's requests to communicate or to meet.

71. On December 20, 2007, Air Canada sent Zemaitis a letter terminating her employment, effective October 26, 2007. This letter was the first communication that Zemaitis had with Air Canada since she had tried to return to work and was sent home on October 27, 2007.

72. On January 4, 2008, Zemaitis appealed the termination of her employment directly to Air Canada's Director of Labor Relations, John Beveridge, hoping that she could resolve her problem by going above Cichy, who had not responded to any of her communication attempts. Beveridge received the letter but did not respond, nor did anyone else at Air Canada respond on his behalf.

73. On August 21, 2008, Laura Wertheimer Hatch, M.D., a physiatrist specializing in physical medicine and rehabilitation examined Zemaitis as the Agreed Medical Examiner for Zemaitis's January 2005 workers' compensation injury. Dr. Hatch diagnosed Zemaitis with chronic lumbosacral musculoligamentous strain with intermittent right lower extremity radiculitis, chronic cervicothoracic musculoligamentous strain, right knee patellofemoral pain syndrome, right ankle strain and right greater than left carpal tunnel syndrome. Dr. Hatch placed permanent work restrictions on Zemaitis of no heavy lifting, repeated bending, repeated stooping, "very prolonged" weight bearing or typing. There were no permanent work restrictions for either the right knee or left hand. With these restrictions, Dr. Hatch stated that Zemaitis could return to her "usual and customary job duties" as a Customer Service Agent - Cargo. Air Canada did not return Zemaitis to work.

74. On June 3, 2009, Cichy sent Zemaitis a letter stating that she was reviewing Zemaitis's file regarding Zemaitis's union grievance and her DFEH complaint. Cichy asked for updated medical documentation regarding Zemaitis's "current conditions, limitations that [Zemaitis] may have, if any, and the duration of such." Cichy also asked for information about Zemaitis's mitigation of damages, including Zemaitis's tax records and all efforts to secure alternate employment. On June 22, 2009, Zemaitis responded to Cichy via email asking Cichy to direct her inquiries and document requests to Clacy Griswold with IBT and to the DFEH.

Zemaitis's Pay and Benefits

75. At the time of her termination, Zemaitis was earning $20.86 per hour, working 40 hours per week. On March 8, 2008, Air Canada raised the wages for the Customer Service Agent – Cargo position to $21.40 per hour.

76. While working at Air Canada, Zemaitis paid $25 per month for medical and dental insurance for the year 2006, which was deducted from every other paycheck Zemaitis received. Prior to her termination by Air Canada, Zemaitis's family was covered under Zemaitis's Air Canada plan rather than her husband Paulus Zemaitis's. Air Canada's plan was less expensive and at times offered better coverage for the Zemaitises than did the plan offered through Paulus Zemaitis's company. After termination, Zemaitis and her daughter obtained health insurance through her husband's employer. The family paid the following amounts per month for medical, dental and vision insurance: $318 (2008); $263 (2009); and $275 (2010). While on Air Canada's health insurance plan, Zemaitis's husband was reimbursed by his employer $50 per pay period.

77. As of December 31, 2006, Zemaitis had accrued $627.81 per month in pension benefits, payable at her normal retirement date of May 31, 2032. Had Zemaitis been able to continue working for Air Canada until her projected retirement date of May 31, 2032, her estimated monthly pension benefits would have been $1,746.23 per month upon retirement.

78. While employed at Air Canada, Zemaitis received free travel on any Air Canada flight, paying only taxes on those flights. On other airlines, as an Air Canada employee, Zemaitis paid on average ten percent of the full fare. Zemaitis received additional hospitality discounts, receiving half-off the cost of hotels, and rental cars. These benefits applied to all three members of the Zemaitis family, with Zemaitis's daughter eligible for the benefits through college. The Zemaitis family traveled an average of one international vacation per year to visit family in London, Egypt, Italy or Lithuania. In addition, Zemaitis regularly visited family in Canada.

79. Air Canada employees with between 15 and 25 years seniority received 20 working days of vacation per year. In 2008, Zemaitis would have worked for Air Canada for 15 years and thus qualified for 20 days' vacation.

80. In 2009, IBT and Air Canada approved an extension of their collective bargaining agreement. As part of IBT's approval of this contract, each employee subject to it received a $1,500 signing bonus in 2009. Zemaitis would have received this signing bonus had she been employed at Air Canada at the time.

81. Zemaitis's family was from Montreal, Canada, and immigrated to the United States when Zemaitis was two. Zemaitis's mother worked for Air Canada for 30 years. Zemaitis considered herself part of the Air Canada family. Except for a few short term jobs, she had worked for Air Canada her entire working life and had no other job skills or experience.

82. Zemaitis began looking for another job in January 2008. From January 2008 until April 2009, Zemaitis applied to 2-3 jobs per month on average. Between April and December 2009, Zemaitis kept records of 79 job applications, between 10-15 applications per month, noting that records of additional applications were lost or destroyed. At one point, Zemaitis applied to every "Employment Services" position listed in the *Penny Saver*, a free advertising paper listing available jobs. Zemaitis applied for jobs both within the airline industry and without. Zemaitis applied for cargo agent and customer service positions at LAX with the following airlines: American, United, Delta, Virgin Atlantic, British Airways, Swissport and Hallmark Aviation. She also diligently followed up a potential employment opportunity at the Transportation Security Administration, but was not hired there.

Zemaitis's Emotional Distress

83. Zemaitis had looked forward to returning to work after the birth of her daughter. Zemaitis's physical condition had steadily improved by summer 2007. Zemaitis was not prepared emotionally or financially for Air Canada's refusal to return her to work. Zemaitis felt humiliated and confused when she was sent home on September 13, 2007 when she attempted to return to work. As Air Canada ignored all of her efforts to communicate and to return to work between September and October 2007, Zemaitis became more anxious and depressed. Zemaitis's emotional stress steadily rose as Air Canada barred her from returning to work and refused to discuss its reasons.

84. On October 11, 2007, when Zemaitis received the first Air Canada termination letter, she was in shock, not expecting this final decision from Air Canada, and she "completely had a breakdown." Even though Zemaitis could see that Air Canada did not want to return her to work, she thought that the company would follow its usual procedure of incremental steps of "writing her up," suspension, then termination, giving her an opportunity to have IBT aid her and to discuss whether she could do the job. Instead, Air Canada denied summarily both grievances that she had filed and did not meet with her to discuss them, as the CBA required, and terminated her abruptly. Zemaitis rated her stress for the month of October 2007 at 8 or 9 on a scale of one to ten.

85. From September of 2007 through January of 2008, Zemaitis felt "in despair." Zemaitis was "getting fired from a job that [she] loved" where she thought that she was going to spend the rest of her professional career.

86. The December 20, 2007, termination letter "devastated" Zemaitis and her husband. Zemaitis described the termination as the worst thing that had ever happened in her life, "as if somebody hit me on the back of the head with a four by four."

87. Losing her Air Canada job "threw [Zemaitis and her husband's] future plans into the air." The couple had planned to have another child and to purchase a home, but these plans were dependent upon their combined incomes.

88. After the termination, Zemaitis sank into depression. Zemaitis did not want to face the day, get out of bed, shower, change clothes, or take care of her baby. Zemaitis closed herself off from friends and family, ignoring her husband and daughter. Zemaitis became nervous, anxious, and unable to make a decision. She did not want to socialize or have any contact with her friends. Zemaitis became more jumpy and irritable with friends and family, losing a close friend of over 10 years because of Zemaitis's moodiness and increased irritability. Zemaitis felt anxious regarding her future and that of her daughter Diana, realizing that her family needed two incomes to provide a comfortable life for her daughter.

89. Zemaitis rated her stress level after receiving the final December 20, 2007, termination letter as a "10." She felt like this from January 2008 until the DFEH accepted her claim in July 2008. At that point, although her stress did not go away, she felt better, feeling that perhaps she would get her job back.

90. Beginning in mid-2008, Zemaitis experienced stress-related eczema on her hands and feet. She described the rash as "embarrassing" and "humiliating" and knowing that people could see the rash increased her nervousness during job interviews. During this time Zemaitis also experienced nightmares several nights per week, in which she would be "dying and falling and not being able to cross over high plateaus."

91. At hearing, Zemaitis sobbed as she recounted that when her baby Diana was one and a half years old, Zemaitis realized that her daughter wasn't smiling or laughing. Diana "never smiled until she was almost two, never laughed until after two." Zemaitis realized that Diana "[didn't] see her mom laughing or smiling or being joyous." After her termination, Zemaitis was unable to throw her daughter a first birthday party, and didn't take her to the playground because she "just couldn't face anybody." Zemaitis "would have been suicidal if not for the baby" but for a time, Zemaitis "did not want to live" and thought that her daughter might be "better [off] without me."

92. Zemaitis's depression and stress affected her marriage. Paulus Zemaitis took "the brunt of everything at that point," becoming the sole financial provider for the family while taking care of Zemaitis and their daughter at home. Paulus Zemaitis also took over a major role in organizing their household. Their physical intimacy was adversely affected. Zemaitis's husband observed that "[s]he wasn't…the woman I married and full of life and outgoing and enthusiastic as she was before."

93. As a consequence of the termination, Zemaitis stated that she would never stand up for herself again. Whereas in the past, Zemaitis thought of herself as a "strong girl," who defended herself and other people against mistreatment, after the termination she would "never open [her] mouth again" because of the potentially devastating consequences, which were just "too painful and stressful."

94. On March 7, 2008, Zemaitis was seen by Daphna Slonim, M.D., a psychiatrist, for a comprehensive psychiatric evaluation. Zemaitis told Dr. Slonim that she had lost her job

"because of her restrictions." Zemaitis reported to Dr. Slonim that she cried at least two to three times per week, had less energy and motivation, and could not sleep. She felt discouraged about the future and had lost a "big part of her self esteem and self confidence". Zemaitis was "tense, nervous, restless," and it was very difficult for her to relax. Zemaitis was "very scared" about her future career and about her finances and she worried a lot about her physical condition, fearing that she would "end up in a wheelchair."

DETERMINATION OF ISSUES

Liability

The DFEH alleges that complainant Caroline Messih-Zemaitis was a person with physical disabilities and that Air Canada had notice of her disabilities. The DFEH asserts that Air Canada failed to engage in a timely, good faith, interactive process regarding reasonable accommodation of her disabilities; failed to reasonably accommodate Zemaitis's disabilities; terminated her because of her disabilities, and failed to take all reasonable steps necessary to prevent discrimination from occurring. The DFEH asserts that this conduct violates, respectively, Government Code section 12940, subdivisions (n), (m), (a), and (k).

A. Physical Disabilities under the FEHA

The DFEH asserts that complainant Caroline Messih-Zemaitis had several disabilities, spinal strain and sprain, disc protrusions, neuroforminal stenosis, anular tear, strain and sprains for both knees and carpal tunnel syndrome, physical disabilities under the FEHA. Air Canada does not dispute that Zemaitis had these conditions, that they are physical disabilities or that they were known to Air Canada at the time she attempted to return to work in September 2007.

1. Whether Zemaitis had a Physical Disability

Under the FEHA, "physical disability" includes, in relevant part, having a disorder which: 1) affects the musculoskeletal system, and 2) limits an individual's ability to participate in major life activities. (Gov. Code, § 12926, subd. (k)(1).) The evidence established that Zemaitis's back, shoulder, knee and wrist conditions are physiological conditions which affected her musculoskeletal system and limited her major life activities including standing, walking, lifting, and performing a variety of manual tasks such as typing. Because Zemaitis's back, shoulder, knee and wrist conditions affected a major life activity, working, they are "physical disabilities" under the FEHA. (Gov. Code, §§ 12926, subd. (k) & 12926.1, subd. (c), Cal. Code Regs., tit. 2, § 7293.6, subd. (f); *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1024 [chronic back injury that limits work activities is a physical disability]; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App. 4th 215, 220 [carpal tunnel syndrome resulting in restrictions on lifting, pulling and pushing is a physical disability].)

The evidence also established that the limitations of Zemaitis's physical disabilities, her lifting restrictions, were "known" to her employer. Air Canada does not dispute this. On September 12, 2007, Zemaitis gave her supervisor Cindy Cichy a return to work release from her physician, Dr. Ebrahimian, which placed work restrictions of no lifting over 15 pounds, no repetitive forceful pushing or pulling, no squatting or kneeling on knees, no repetitive finger and wrist movements, no repetitive overhead shoulder range of motion and no very heavy work. An employer is required to accommodation the known limitations required by a disability if it can do so without undue hardship. (*Dept. Fair Empl. & Hous. v. Avis Budget Group* (Oct. 19, 2010) No. 10-05-P [2010 WL 4901733 at *14 (Cal.F.E.H.C.)]; *Taylor v. Principal Financial Group, Inc.* (5th Cir. 1996) 93 F.3d 155, 164 [employer required to accommodate known limitations flowing from a disability]; *Taylor v. Phoenixville School Dist.* (3rd Cir. 1999) 184 F.3d 296, 314.)[2]

Thus, the evidence established that Zemaitis had physical disabilities, known to her employer, which limited her major life activities, including standing, walking, lifting, and manual tasks.

2. Whether Zemaitis Could Perform the Essential Job Functions With or Without Reasonable Accommodation

Air Canada asserts that Zemaitis was not a "qualified individual," an individual who could perform all of the essential functions of the Customer Service Agent - Cargo position with or without reasonable accommodation. Air Canada asserts that Zemaitis was not qualified because of the lifting restrictions which prevented her from performing the Warehouseman duties of the Customer Service Agent - Cargo job.

The DFEH asserts that Zemaitis could perform all her essential functions of the Customer Service Agent - Cargo position, disputing that the Warehouseman duties were essential job functions of the agent position. The DFEH asserts that any accommodations needed, such as using a stool, talking on a headset, or keeping needed supplies on lower shelves were all de minimus accommodations which would not cause Air Canada undue hardship.

Government Code section 12926, subdivision (f), defines "essential functions" as "the fundamental job duties of the employment position that the individual holds or desires." Where the issue is disputed, evidence to be considered in determining whether a particular duty is essential includes: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before the dispute arose; (3) the amount of time spent

[2] Given the similarity of the goals shared by the FEHA and its federal equivalent, the Americans with Disabilities Act of 1990 (Pub.L. No. 101-336) (Jul. 26, 1990) 104 Stat. 328, 42 U.S.C. § 12101, et seq. (ADA), as amended, ADA Amendments Act of 2008 (Pub.L. No. 110–325) (Sep. 25, 2008) 122 Stat. 3554 (ADAAA), it is appropriate to examine federal guidelines and precedent for assistance in construing the FEHA, as the federal law provides a "floor of protection" for persons with disabilities. (Gov. Code § 12926.1, subd. (a).)

on the job performing the function; (4) the consequences of not requiring the complainant to perform the function; (5) the terms of a collective bargaining agreement; (5) the work experience of past incumbents in the job, and (6) that of people presently holding similar jobs. (Gov. Code § 12926, subd. (f)(2)(A)-(G).)

Air Canada maintained that the Customer Service Agent - Cargo position, as set forth in its longstanding job description, required its agents to be able to perform both Customer Service Agent cargo office and Warehouseman duties. Further, Air Canada noted, the collective bargaining agreement acknowledged Air Canada's exclusive right to create job descriptions for its employees covered by the IBT-Air Canada contract, as the CBA stated that Air Canada would supply the union with job descriptions. Yet, an appended 1999 Letter of Agreement stated that at least one location, at the JFK airport cargo facility, Customer Service Agents was not required to perform any Warehousemen duties. Whether this letter applied to other facilities such as LAX's cargo facility was contested between management and LAX union officials and employees, a dispute that this decision does not need to resolve.

The DFEH argued that the practice on the ground at the LAX cargo facility at all relevant times was not accurately reflected in the Customer Service Agent - Cargo job description, as the LAX cargo agents were not required to perform Warehousemen duties.

Three Air Canada Customer Service Agents working in the LAX cargo facility, Zemaitis, Worrell Campbell, and Jaime Cordero, testified about their past and present work experience as Customer Service Agents at the LAX cargo facility. All three consistently and credibly testified that the cargo facility Customer Service Agent positions, with the rare exception of vacation relief, never involved warehousemen duties. The agents could recall only three instances, two involving Zemaitis, where Cichy had required a Customer Service Agent - Cargo to work in the warehouse – each time when the cargo agent was working the vacation relief shift. All other cargo facility shifts—import-export, accounting, front counter, and bookings—worked full-time at office tasks which never required performing warehousemen duties. Each job could be performed at a pace determined by individual agents, assisting each other.

The three Customer Service Agents testified that the major part of their job could be performed sitting, with limited standing and walking associated with office work. They also testified that except for the few disputed vacation shifts in the warehouse, mentioned above, they never: lifted or carried unaided any objects weighing 70 pounds; pushed or pulled objects such as carts, pallets or ULDs; balanced, stooped, knelt, crouched, crawled or climbed, except to go up the stairs to the second floor to collect the mail.

Notably, Air Canada did not call any Customer Service Agents from the cargo facility to contradict these three agents' testimony, relying exclusively on Cichy's testimony. And, although Cichy testified that she saw several Customer Service Agents working in the warehouse, she admitted that they could have been there as a result of vacation relief, day trades, shift trades or overtime hours. Cichy was unable to cite a single instance when a Customer Service Agent working in import-export, accounting, front counter, or bookings

was required to perform warehousemen duties – performing such duties was limited to the few occasions she had required a Customer Service Agent on a vacation relief shift to work in the warehouse.

The evidence established that the Customer Service Agent position in cargo existed to perform office functions and not physical warehouse tasks. Customer Service Agents in the cargo facility spent the vast majority of their time seated inside the cargo office performing administrative tasks, whereas Warehousemen performed the physical tasks in the warehouse and were not allowed in the cargo office.

Customer Service Agents in cargo were not trained in Warehouseman duties, did not have weight belts to protect their backs, did not wear steel-toed boots in the office, and did not know how to drive forklifts to move heavy objects. Customer Service Agents who had previously worked as Warehousemen could pick up extra warehousemen shifts, through shift trades or overtime, but they were not required to work these shifts.

Looking at the totality of the evidence, this decision concludes that at the LAX cargo facility, the essential functions of the Customer Service Agent position were clerical, performed inside the office. Any warehouse duties were marginal to the job, performed only on rare occasions by a Customer Service Agent working vacation relief when no Warehouseman was available that day to perform those duties.

Further, the evidence established that the employees at LAX cargo bid on available work shifts according to seniority. Zemaitis, with 14 years' seniority in 2007, had accrued sufficient seniority that she could avoid ever bidding on the vacation relief shift if this position might occasionally entail working in the warehouse.

The evidence also established that Zemaitis could perform the essential functions of the Customer Service Agent - Cargo position with reasonable, de minimus accommodations to perform her clerical duties, such as using a headset to answer the telephone to avoid carpal tunnel problems, moving files from a high to a lower shelf, taking stretch breaks, using a heating pad, or wearing a back brace. Zemaitis had successfully performed her duties after injuring her back in January 2005, twice returning to work with more onerous work restrictions (no lifting over 10 pounds on March 18, 2005, and no "heavy work" on March 15, 2006). There was no reason to believe that Zemaitis could not have performed these same duties with a lighter work restriction of no lifting over 15 pounds, as provided by her September 12, 2007 release (eased to 20 pounds by October 10, 2007), as no clerical duty in the cargo office required her to lift any package over this amount without asking for assistance from a co-worker or a Warehouseman.

Thus, the DFEH established that Zemaitis was a "qualified individual" who could perform the essential job functions with or without reasonable accommodation. (*Dept. Fair Empl. & Hous. v. City of Fullerton* (May 6, 2008) No. 08-04-P [2008 WL 2335108 at *10 (Cal.F.E.H.C.)]; *Green v. State of Cal.* (2007) 42 Cal.4th 254, 262.)

B. Failure to Engage in the Interactive Process (Gov. Code, § 12940, subd. (n))

The DFEH charges that Air Canada failed to engage in the interactive process, in violation of Government Code section 12940, subdivision (n). Air Canada disputes any violation, claiming that Zemaitis did not request a reasonable accommodation, and that the process was thus not triggered.

The FEHA provides that it is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n), *Jensen v. Wells Fargo Bank* (*Jensen*) (2000) 85 Cal.App.4th 245, 262-263.) An employer's obligation to initiate an interactive process is triggered once the employee gives notice of his or her disability and desire for reasonable accommodation, or when the employee's disability is known or apparent. (*Dept. Fair Empl. & Hous. v. City of Fullerton, supra,* 2008 WL 2335108 at *16; *Jensen, supra*, 85 Cal.App.4th at p. 261, citing *Barnett v. U.S. Air, Inc*. (9th Cir. 2000) 228 F.3d 1105; *Prilliman v. United Airlines, Inc*. (1997) 53 Cal.App.4th 935, 950.) The employee must cooperate with his or her employer in "good faith" and provide the employer with all relevant information relating to the disability and possible accommodation. (*Jensen*, *supra*, 85 Cal.App.4th at p. 266.)

1. Notice of Need for Reasonable Accommodation

Respondent contends that Zemaitis never requested a reasonable accommodation, and that this failure to initiate the process relieves it of any duty to engage in the interactive process. The DFEH states that Air Canada's obligation to engage in the interactive process was triggered on September 12, 2007, when Zemaitis submitted Dr. Ebrahimian's release to return to work with work restrictions and Air Canada believed that she could not perform her job with these restrictions.

"Although it is the employee's burden to initiate the process, no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 62, fn. 22.)

The evidence here shows that Zemaitis made her disability and limitations known to Air Canada on September 12, 2007, when she faxed Dr. Ebrahimian's work release to Cichy. Once Air Canada knew of Zemaitis's disability, it had an affirmative duty to communicate with Zemaitis regarding possible accommodations to her job if it felt that Zemaitis, with her work restrictions, needed accommodation to perform the essential functions of her job. Case law makes clear that the employer must initiate the process if the employee's disability is known or apparent in requiring accommodation. (*Prilliman v. United Air Lines, Inc., supra,* 53 Cal.App.4th at pp. 950-951.)

2. Timely, Good Faith Interactive Process

The DFEH alleges that Air Canada violated the "timely, good faith" requirement of Government Code section 12940, subdivision (n), by its failure to communicate with both Zemaitis and the IBT to explore a reasonable accommodation for Zemaitis. Air Canada contends that it engaged the IBT by agreeing to arbitration of Zemaitis's grievances, and that a reasonable accommodation was offered to Zemaitis – offering her a two year medical leave of absence, thus fulfilling Air Canada's participation in the interactive process.

"Employers can show their good faith in a number of ways, such as taking steps like the following: meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered the employee's request, and offer and discuss available alternatives when the request is too burdensome. These steps are consistent with the recommendations in the EEOC's interpretive guideline. See 29 C.F.R. Pt. 1630, App. § 1630.9 at 359-61." (*Taylor v. Phoenixville School District, supra,* 184 F.3d at p. 317.)

The DFEH provided extensive documentation of Zemaitis's repeated attempts to contact Cichy, LeBlanc and Beveridge in order to discuss returning to work, and by their own admission, neither Cichy, LeBlanc nor Beveridge replied to any of Zemaitis's emails, letters or phone calls. Between September 12, 2007, and January 4, 2008, Zemaitis sent seven written communications to Air Canada management, and made numerous phone calls, regarding her job status. Air Canada did not respond to any of Zemaitis's attempts to communicate, and instead on October 11, 2007, sent her a boilerplate letter offering her the option of either taking an unpaid medical leave of absence for up to two years or self-terminating her employment.

Air Canada attributes its lack of communication, first to a letter from Zemaitis's worker's compensation attorney asking Air Canada to communicate directly with him. Air Canada did not produce the letter at hearing, did not offer any testimony that it attempted to engage Zemaitis's attorney in the interactive process, and no one from Air Canada communicated to Zemaitis that her attorney allegedly had barred direct contact between Zemaitis and Air Canada.

Respondent next contends that it was barred from speaking to Zemaitis after she filed a union grievance. This claim was similarly unpersuasive. Zemaitis did not file her initial grievance until October 11, 2007, almost one full month after Zemaitis's September 12, 2007 email to Cichy. Air Canada made no attempt to contact Zemaitis in the month-long period before she filed the grievance despite repeated requests by Zemaitis that it do so. In fact, the evidence demonstrates that by October 5, 2007, Air Canada had unilaterally decided that Zemaitis could not return to work. The letter informing Zemaitis of this decision had already been drafted by October 7, 2007, the date that Cichy conveyed the existence of this letter to Bill Kanter, Zemaitis's union representative.

Further, once Zemaitis filed a union grievance, Air Canada rebuffed all attempts by IBT to assist Zemaitis to return to work. Air Canada denied without explanation both of Zemaitis's grievances, made on October 11, 2007 and October 27, 2007. As of the first date of hearing in this matter, no hearing had been held on either grievance, either through a "Systems Board" meeting or arbitration. Air Canada ignored an October 12, 2007 request from Zemaitis that Air Canada meet with herself and IBT to discuss Zemaitis's return to work and such a meeting never took place. Air Canada refused to agree to IBT's request for a neutral physician to examine Zemaitis. Indeed, Air Canada elicited no testimony that Cichy or anyone else in Air Canada's management communicated with IBT regarding reasonable accommodations possibilities for Zemaitis.

Internal email communications between Cichy, LeBlanc and Beveridge reveal that Air Canada's management felt that they were under no duty to discuss with Zemaitis or her representative any reasonable accommodation possibilities or in any way engage in an interactive process with her. On September 14, 2007, Cichy emailed to LeBlanc that Zemaitis "cannot just return to work with all these restrictions." LeBlanc responded by email the next day, "I agree with you that she cannot come back if she has restrictions that you cannot accommodate. The attorney [representing Zemaitis in her workers' compensation matter] does not dictate when she returns to work, you do." And, on October 17, 2007, Beveridge emailed Cichy: "Whether [Zemaitis] likes the options [the two year medical leave or self-termination] or not is not within her prerogative. You are simply providing her with her options as per the collective bargaining agreement. No meeting or disclosure of information is available through this process. She has to select an option or it will be a default selection which she won't like."

During the three-month period prior to her termination during which Air Canada did not allow Zemaitis to return to work, Air Canada did not attempt to discuss any accommodation with Zemaitis, including the unpaid medical leave option which Air Canada alleges was offered as part of the accommodation process. Zemaitis was given no choice or say in the matter. Thus, Air Canada's process for determining reasonable accommodation for Zemaitis was neither "interactive," "timely," nor done in "good faith" within the meaning of the FEHA.

Respondent has no legitimate excuse for its failure to engage in the interactive process. Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." (*Scotch v. Art Inst. of California-Orange County* (2009) 173 Cal.App.4th 986, 1014, citing *Jensen, supra,* 85 Cal.App.4th at p. 266.) Failure of the interactive process rests with Air Canada.

Accordingly, this decision finds that Air Canada failed to engage in a timely, good faith, interactive process to determine effective reasonable accommodation for Zemaitis's disability. Air Canada thereby violated Government Code section 12940, subdivision (n).

C. Failure to Provide Reasonable Accommodation (Gov. Code § 12940, subd. (m)

The DFEH asserts that Zemaitis failed to provide reasonable accommodation. Air Canada contends that Zemaitis did not allege any disability, that Zemaitis insisted that she did not need any accommodation, but nonetheless, Air Canada offered Zemaitis an accommodation of a two year medical leave of absence as provided for under the CBA.

Under the FEHA, it is unlawful for an employer to fail to make reasonable accommodation for the known physical or mental disability of an employee unless doing so would pose an undue hardship on the employer. The DFEH must establish, by a preponderance of the evidence, that the employee has a disability covered by the FEHA, that the employee can perform the essential functions of the job with or without reasonable accommodation, and that the employer failed to reasonably accommodate the employee's disability. (Gov. Code § 12940, subds. (a) & (m); Cal. Code Regs., tit. 2, § 7293.9; *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.) Further, the DFEH must demonstrate that the employer is aware of the employee's disability and limitations arising from that disability. (*Prilliman v. United Airlines, Inc., supra,* 53 Cal.App.4th at pp. 951-952, 954; *Taylor v. Phoenixville School Dist., supra,* 184 F.3d at p. 313; *Smith v. Midland Brake, Inc.* (10th Cir. 1999) 180 F.3d 1154, 1171-1172.) If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations." (ADA Regulations and Appendix at 29 C.F.R. pt. 1630.9, app. § 1630.9 (July 1, 2009).)

It is the employer's burden to demonstrate that the proposed accommodation would pose an undue hardship or that the employee cannot perform the essential job functions with or without reasonable accommodation. (Cal. Code Regs., tit. 2, § 7293.9; *Dept. Fair Empl. & Hous. v. California State University, Sacramento* (May 20, 1988) No. 88-08, FEHC Precedential Decs. 1988-89, CEB 3, p. 19 [1988 WL 242638 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Kingsburg Cotton Oil Co.* (Dec. 7, 1984) No. 84-30, FEHC Precedential Decs. 1984-85, CEB 11, p. 31 [1984 WL 54310 (Cal.F.E.H.C.)].)

On September 12, 2007, Zemaitis presented to her employer a return to work note from her doctor which specified that she had lumbar and cervical spine herniated disks and needed work restrictions of no lifting over 15 pounds, no repetitive forceful pushing or pulling, no squatting or kneeling on knees, no repetitive finger and wrist movements, no repetitive overhead shoulder range of motion and no very heavy work. As she had worked for two years with similar work restrictions, she did not believe that she needed any specific accommodations from her employer, and thus, Zemaitis did not ask for accommodation. Yet in asking to return to work with restrictions, Zemaitis was in effect seeking an accommodation allowing her not to be assigned any further warehouse tasks, found by this decision to be a marginal function of her job.

Air Canada argues that it did provide Zemaitis with reasonable accommodation which she rejected, a two year medical leave of absence. As she had already been on leave for one year, including the time to have her baby, this really was one year of additional unpaid leave. This option was not a viable choice not only because of the wage loss, but also because

reinstatement was not guaranteed, being only possible if there were vacancies in her work category and seniority district. If she did not return to work within two years, she forfeited her seniority and Air Canada could terminate her. Further, Zemaitis would accrue no pension credits while on leave, and she would be responsible for all medical benefits. Air Canada offered no evidence that a two year medical leave of absence would alleviate Zemaitis's chronic back disabilities or eliminate her "permanent" restriction precluding her from lifting more than 15-20 pounds. At most, an extra year of leave would have postponed Air Canada's inevitable decision to terminate Zemaitis's employment. Thus, Air Canada has not demonstrated that the "accommodation" offered was an effective one to allow Zemaitis to perform the essential functions of her job.

More fundamentally, this option was unacceptable because the evidence established that Zemaitis's work history since her January 2005 back injury indicated that even with her herniated disks and other physical problems, she could nonetheless perform all aspects of her cargo facility job with de minimus accommodations such as using a telephone headset, moving documents to be filed to a lower shelf, and using a heating pad when necessary. She could not perform any heavy lifting, however, and thus, she could not perform those tasks, which were Warehouseman duties. Nonetheless, the DFEH established that Zemaitis could avoid being assigned marginal Warehouseman duties if she never bid on a vacation shift, as no other position required her to perform those duties and her seniority shielded her from needing to bid on vacation relief shifts. Thus, this was an accommodation that was viable. Air Canada did not explore this as a possibility, however, and instead rejected Zemaitis's return to work out of hand based on a job description that did not accurately reflect Zemaitis's essential job functions.

Government Code section 12926, subdivision (s), defines undue hardship and provides a list of factors for employers to establish that a requested accommodation would cause an employer undue hardship.[3] Air Canada presented no evidence utilizing these factors to establish that allowing Zemaitis to perform her usual work functions with her job restrictions, as requested, would have caused it undue hardship.[4]

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[3] Government Code section 12926, subdivision (s), provides:

"Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.
(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.
(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.
(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.
(5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

[4] This decision notes that the August 21, 2008 Agreed Medical Examination (AME) report stated that Zemaitis could return to her "usual and customary job duties" as a Customer Service Agent – Cargo, a conclusion that Air Canada ignored.

In sum, this decision finds that refusing to reinstate Zemaitis to her position as a Customer Service Agent – Cargo, offering her the unacceptable option of a two year medical leave of absence and thereafter terminating her employment, violated Air Canada's duty to reasonably accommodate Zemaitis. Thus, the DFEH established that Air Canada violated Government Code section 12940, subdivision (m).

D. Discrimination on the Basis of Disability (Gov. Code, § 12940, subd. (a))

The DFEH asserts that because of Zemaitis's disabilities, Air Canada barred Zemaitis from returning to work and terminated her employment. Air Canada disputes that it took any adverse actions against Zemaitis because of her physical disabilities; rather, it asserts she could not perform the essential functions of the position with her job restrictions, and thus, it terminated her employment.

Discrimination is established if a preponderance of the evidence demonstrates a causal connection between Zemaitis's disabilities and an adverse action by Air Canada. The evidence need not demonstrate that Zemaitis's disabilities were the sole or even the dominant cause of the adverse action. Discrimination is established if her disabilities were one of the factors that influenced Air Canada. (*Dept. Fair Empl. & Hous. v. City of Fullerton*, *supra*, 2008 WL 2335108, at *9; *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, at p. 5 [1988 WL 242635 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Kingsburg Cotton Oil Co.*, *supra*, 1984-85, CEB 11, at p. 21; Cal. Code of Regs., tit. 2, § 7293.7.)

The evidence established that Air Canada barred Zemaitis from returning to work after receiving Dr. Ebrahimian's September 12, 2007 note with work restrictions no more onerous than those provided by Zemaitis's doctors in the prior two years, when Zemaitis had successfully performed her Customer Service Agent job in the cargo facility. And, rather than explore reasonable accommodation with her if Air Canada felt that she could not perform the essential functions of her job with these restrictions, it gave her the choice of either a two year medical leave or self-termination. Thereafter, Air Canada terminated her employment. Air Canada did not establish any defense which justified its actions.

Accordingly, the DFEH has established that Air Canada barred Zemaitis from returning to work because of her physical disabilities and terminated her employment, in violation of Government Code section 12940, subdivision (a).

E. Failure to Take All Reasonable Steps to Prevent Discrimination (Gov. Code, § 12940, subd. (k)

The DFEH also charges that Air Canada violated the Act by failing in its affirmative duty, under Government Code section 12940, subdivision (k), to take all reasonable steps necessary to prevent discrimination from occurring. Air Canada asserts that it took all reasonable steps to prevent discrimination.

The DFEH asserts that Air Canada: 1) failed to follow its own disability discrimination and reasonable accommodation policies; 2) had a program for disabled workers which adequately failed to address long-term disabled employees; 3) did not have any policy on employee communications with the company after a grievance had been filed; 4) did not train its managers to handle FEHA disability discrimination claims; and 5) failed to follow its own safety policies. Air Canada argues that it had appropriate policies in place addressing reasonable accommodation and the interactive process and set forth procedures for employees who requested reasonable accommodation.

The evidence established that Air Canada had a number of disability discrimination policies and procedures in place yet ignored all of them in stonewalling Zemaitis's request to be returned to work, reasonably accommodated, and engage in a timely, good faith interactive process. Air Canada presented evidence that it had a disability discrimination policy banning discriminating on the basis of disability; a Harassment Awareness for Managers directing managers to look for and to present to employees several options for reasonable accommodation; and an Employee Transitional Duty and Safe Return to Work program that was a modified work program for disabled employees needing accommodations. These forms were based on Canadian statutes and case law. Air Canada had no policies based on either the ADA or the FEHA and had provided no training to its managers regarding FEHA's obligations, especially regarding the interactive process. Air Canada's program for return to work for industrially injured employees needing accommodation could only be used by employees with on-the-job injuries who could be returned to full, unrestricted duty within 90 days of their injury. Air Canada did not have a long term disability program for all disabled employees other than the two options it offered to Zemaitis: self-termination or unpaid medical leave.

In sum, the evidence established that Air Canada had no information about California law regarding disability, including employees' rights and its responsibilities. The company's program for disabled workers applied only to temporary, industrially-based disabilities. What programs the company did have regarding reasonable accommodation or safety policies were not followed by its management employees. All of this establishes that Air Canada had failed to take all reasonable steps necessary to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (k).

Remedy

Having established that Air Canada violated the Act, the DFEH is entitled to whatever forms of relief are necessary to make Zemaitis whole for any loss or injury she suffered as a result. The DFEH must demonstrate, where necessary, the nature and extent of the resultant injury, and Air Canada must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, pp. 33-34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The DFEH's accusation sought back pay, lost benefits, reinstatement, compensatory damages for complainant's emotional distress, an administrative fine, and affirmative relief.

A. Make-Whole Relief

1. Back Pay

The DFEH seeks an award of back pay to compensate Zemaitis for her lost wages resulting from her termination on October 26, 2007. Air Canada contends that Zemaitis has not adequately mitigated her damages, and that she is therefore not entitled to any lost wages.

Zemaitis is entitled to receive back pay for the wages she otherwise could have expected to earn but for Air Canada's violation of the Act. (*Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407.) Air Canada bears the burden to prove any lack of mitigation of wages. (*Parker v. Twentieth Century-Fox Film Corporation* (1970) 3 Cal.3d 176, 181-182; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com. supra,* 220 Cal.App.3d at p. 407.)

In order to prevail on its claim of a failure to mitigate, Air Canada must prove that "comparable" or "substantially similar" employment was available to Zemaitis. (*Parker v. Twentieth Century-Fox Film Corp., supra,* 3 Cal.3d at p. 182; *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 985.) Air Canada must show that Zemaitis failed to use "reasonable diligence" to obtain and retain such employment throughout the period for which back pay (or front pay) is sought. (*Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231-232; *West v. Bechtel Corp., supra,* 96 Cal.App.4th at p. 985.) Lastly, Air Canada must prove the amount that Zemaitis earned or with reasonable efforts might have earned from other employment. (*Parker v. Twentieth Century-Fox Film Corp., supra,* 3 Cal.3d at p. 181.)

Air Canada asserts that Zemaitis failed to mitigate her damages because she failed to apply for positions similar to the one she held while at Air Canada, instead applying for non-comparable work with a variety of employers. This reasoning misinterprets employment case law on mitigation of damages and misrepresents the record, which showed that Zemaitis applied for similar positions with seven other airlines as well a total of at least 79 jobs with a variety of employers. At the hearing, Air Canada did not offer any evidence of positions

comparable or substantially similar to her Customer Service Agent – Cargo job to which Zemaitis could have applied, but did not. The DFEH established that Zemaitis applied for similar positions with American Airlines, Delta Airlines, United Airlines, Virgin Atlantic, British Airways, Swissport International Ltd., and Hallmark Aviation Services as well as the Transportation Security Administration. Air Canada also offered no evidence of the amount Zemaitis with reasonable efforts might have earned from other employment.

Thus, Air Canada did not meet its burden that Zemaitis failed to mitigate her damages.

This decision finds that Zemaitis is entitled to her lost wages from the date of her termination, October 26, 2007, to the first date of hearing, February 16, 2010, a period of 120.5 weeks, less any earnings accrued within that time period. (Cal. Code Regs., tit. 2, § 7286.9, subd. (a)(1).)

Zemaitis's back pay award is $102,737.60, calculated as follows:

Dates	Hourly Rate	Hours/Week	Weeks	Total Wages
10/26/07 – 3/08/08	$20.86	40	19.0	$ 15,853.60
03/08/08 – 2/16/10	$21.40	40	101.5	86,884.00
Total				$102,737.60

The record did not establish any earnings accrued during this period. Thus, the decision awards $102,737.60 in back pay. Interest shall accrue on this amount, at the rate of ten percent per year, compounded annually, from the date the earnings accrued until the date of payment.

2. Benefits

The DFEH additionally seeks the replacement costs of the benefits that Zemaitis enjoyed as an Air Canada employee. Respondent makes no argument regarding Zemaitis's benefits. Because the DFEH has established that Zemaitis used "reasonable diligence" to try to mitigate her damages, Zemaitis is owed replacement costs of the benefits she enjoyed as an Air Canada employee. (*United States v. Burke* (1992) 504 U.S. 229, 239 [lost benefits, including vacation pay and pension benefits]; *Rivera v. Baccarat, Inc.* (S.D.N.Y. 1999) 34 F.Supp. 2d 870, 875 [medical and pension benefits]; *EEOC v. Service News Co.* (4th Cir.1990) 898 F.2d 958, 964 [medical benefits]; *Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607-608 [lost fringe benefits, including medical and life insurance].)

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The replacement cost of Zemaitis's health care benefits is $6,872, calculated as follows:

Dates	Months	Cost/Month (less $25 estimated cost of Zemaitis's insurance through Air Canada)	Total Cost
1/1/08-12/31/08	12 x	$293	$3,516
1/1/09-12/31/09	12 x	$238	2,856
1/1/10-02/16/10	2 x	$250	500
Total			$6,872

Zemaitis is also owed the $1,500 signing bonus that she would have received for the IBT Collective Bargaining Agreement in 2009.

The DFEH also seeks awards for the 40 working days of vacation (20 per year) that she would have enjoyed as a result of her 15-year tenure at Air Canada in 2008 – 2010 and for travel benefits. In 2008, Zemaitis earned $21.40 per hour or $171.20 per day. Thus, for 40 days of lost vacation, Zemaitis would have earned $6,848 in lost vacation pay.

The DFEH estimates Zemaitis's lost travel privileges to be worth $1,500 per year. This estimation is reasonable considering that the Zemaitises were accustomed to taking one international vacation per year using Zemaitis's travel benefits, and a 3-day trip to Mexico in 2007 cost the family $1,200 per person when they did not use Zemaitis's travel benefits.[5] Accordingly, Air Canada shall compensate Zemaitis $4,500 for lost travel benefits during the years 2008 – 2010.

Thus, the evidence established that Zemaitis is owed the following in lost benefits: $6,872 in medical benefits; $1,500 for an Air Canada – IBT signing bonus; $6,848 for lost vacation pay and $4,500 in lost travel benefits, for a total of $19,720. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the date of accrual until the date of payment.

3. Reinstatement

The DFEH seeks Zemaitis's reinstatement to her Customer Service Agent – Cargo position, or in lieu of reinstatement, front pay and other employment benefits. Air Canada will be required to offer Zemaitis a position as a customer service agent at the LAX cargo facility, if such a position is currently available, and if not, offer her a substantially similar position that is acceptable to Zemaitis until a position as a Customer Service Agent - Cargo

[5] The amount spent on the Zemaitises' 2007 Mexican vacation is for reference only; this vacation is not reimbursed by this decision.

becomes available. The substantially similar position must have the same rate of pay and benefits and accrued seniority as if she had been continuously employed. Zemaitis shall have 10 days from the date of respondent's offer of reinstatement to accept or reject reinstatement. If Zemaitis accepts the position, Air Canada shall grant Zemaitis all seniority, status, and other terms, conditions and privileges of employment that would have accrued to Zemaitis had she not been terminated on October 26, 2007.

4. Front Pay

The DFEH seeks front pay to the effective date of the decision in this matter and thereafter in the event that reinstatement is not feasible or not accepted by Zemaitis. Front pay covers earnings from the date of hearing until the date of actual remedying of discrimination. (*Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 U.S. 843, 848, citing *EEOC v. Enterprise Assn. Steamfitters*, 542 F.2d 579, 590 (2d Cir. 1976); *Horsford v. Bd. of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 388.) Air Canada will therefore be required to compensate Zemaitis for her continuing wage loss following the first date of hearing, that is, from February 16, 2010, until she is either reinstated, refuses an offer of reinstatement, or achieves and maintains equivalent earnings. (*Dept. Fair Empl. & Hous. v. The Standard Register Company* (Mar. 29, 1999) No. 99-04, FEHC Precedential Decs. 1999, CEB 2 [1999 WL 335138 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Centennial Bank* (Jan. 30, 1987) No. 87-03, FEHC Precedential Decs. 1986-87 CEB 6, p. 19 [1987 WL 114851 (Cal.F.E.H.C.)].) The parties shall attempt to agree upon the amount awarded to Zemaitis for front pay, and shall report the agreed amounts to the Commission for its approval or report the failure to agree. If the parties cannot agree or the Commission does not approve, this issue will be returned for further hearing.[6]

5. Damages for Emotional Distress

The DFEH seeks an award of emotional distress damages to Zemaitis. (Gov. Code § 12970, subd. (a)(3).) The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).)

In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or

[6] The DFEH also requests that respondent credit Zemaitis for the period of time that she has been out of work, starting September 13, 2007 until she is reinstated by Air Canada. In the alternative, if she is not reinstated, DFEH states that Air Canada should credit Zemaitis with 11 years of seniority towards her pension, the number of years of pension credits required for Zemaitis to retire. The DFEH gives no authority for this request, and thus, it is denied.

her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc., supra,* 1988-89, CEB 4, at pp. 8-10.)

Zemaitis had loyally worked for Air Canada for 14 years. Her promotion to a lead Customer Service Agent and her assignment to work with Air Canada's elite passengers evidenced that Air Canada regarded her as a well-performing, valuable employee. Zemaitis twice injured her back badly, moving a heavy passenger in 1996 and then herniating several disks in 2005 when forced to move mail that Zemaitis was not trained, equipped, or physically fit to do. Zemaitis continued to work for the company and work through her pain, self-modifying but completing all of her office cargo position duties. Then, after her 2007 injury, Air Canada refused to return her to work, refused to discuss the situation with her, and terminated her employment.

Zemaitis looked forward to returning to work after her leave and the birth of her daughter. She needed the income for her family's financial needs. Zemaitis was not ready emotionally or financially for Air Canada's refusal to return her to work. She felt humiliated and confused when she was sent home on September 13, 2008, and increasingly anxious and depressed when Cichy thereafter refused to communicate with her. Zemaitis was devastated when she received Air Canada's October 11, 2007 termination letter, having a "complete breakdown."

Losing her Air Canada job seriously disrupted Zemaitis and her husband's future plans. They postponed having another child and did not purchase a home, due to their changed financial circumstances.

After the termination of her employment, Zemaitis sank into depression. She could not perform daily tasks. She neglected family and friends. She could not bear to throw a first year birthday party for her daughter. Zemaitis did not smile or laugh and realized as her daughter was turning two that she had never seen her daughter smile or laugh, mirroring her mother. Zemaitis contemplated suicide, thinking her daughter would be better off without her. She sobbed at hearing describing her depression's effect on her daughter. The depression and stress seriously affected her marriage.

Zemaitis was so traumatized by the termination that she fundamentally altered her approach to the world. She determined that in the future she would forego defending herself and others from mistreatment, and instead, would never "open her mouth again" because the potential devastating consequences were just "too painful and stressful."

The DFEH requested an award of $125,000. This decision finds that the evidence at hearing of profound emotional distress caused by the termination of Zemaitis's employment

more than warranted this amount.[7] Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (c), this decision orders Air Canada to pay Zemaitis $125,000 in damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

B. Administrative Fine

The DFEH also seeks an order awarding an administrative fine against Air Canada. Air Canada denies that any such award is appropriate.

The Commission has the authority to order administrative fines pursuant to the Act where it finds, by clear and convincing evidence, a respondent "has been guilty of oppression, fraud, or malice, expressed or implied, as required by section 3294 of the Civil Code." (Gov. Code, § 12970, subd. (d).) "Malice" is defined to include conduct intended to cause injury or despicable conduct, which is undertaken with a "willful and conscious disregard" of an employee's rights. (Civ. Code § 3294, subd. (c).) "Oppression" is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Id.*)

In determining the appropriate amount of an administrative fine, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of the complainant; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).) Any administrative fine is payable not to complainant but to the state's General Fund, and may not exceed, in combination with any award of compensatory damages for emotional distress, $150,000 per complainant, per respondent. (Gov. Code, § 12970, subds. (a)(3); (b)(6)(c); and (b)(6)(d).)

Contrary to Air Canada's assertions, its conduct, as detailed below, shows a pattern of oppressive and malicious conduct.

After Zemaitis's leave for injuries stemming from assignment to Warehouseman duties, Zemaitis was repeatedly and willfully ignored when she attempted to return to work, by her immediate supervisor Cindy Cichy, by Air Canada's Employee Service Manager Michel LeBlanc, and by the airline's Director of Labor Relations John Beveridge. From September 12, 2007, to January 4, 2008, Zemaitis reached out to her supervisors countless times – via phone calls, emails, and regular mail – and Air Canada's management consistently avoided every one of Zemaitis's attempts to communicate. Instead of addressing Zemaitis' concerns directly with her, or through the IBT, Air Canada's management team forwarded her emails among themselves, evading responsibility to

[7] The emotional distress caused by Zemaitis's concerns about her physical problems is not imputable to Air Canada and are not part of this calculation of Zemaitis's actual damages.

ascertain whether she could be reasonable accommodated. Rather than meet with Zemaitis to discuss her return to work and any needed accommodations, Air Canada's management stonewalled her, evading all communication except for two termination letters, although the evidence demonstrates that her requests were much discussed among Cichy, LeBlanc, and Beveridge. This is especially appalling considering that Zemaitis simply wanted to continue her 14-year service with Air Canada after a brief interruption, and was merely asking for guidance from someone, *anyone*, on how to make this transition easier for herself and the company. Air Canada's oppressive conduct toward Zemaitis subjected her to cruel and unjust hardship, and was undertaken with a complete disregard of the FEHA, and an unconscionable disregard for Zemaitis's rights as a disabled employee.

As clearly and convincingly demonstrated in the discussion about the interactive process, Air Canada purposefully ignored all of Zemaitis's attempts to engage in the interactive process. Air Canada never considered *any* reasonable accommodation for Zemaitis. Internal emails consistently demonstrate that Air Canada's management considered Zemaitis to be a problem that needed to be dealt with, either via an unpaid leave or self-termination, rather than a 14-year employee who wished to continue her service with the company with whom she had spent almost the entirety of her working career.

Instead of acknowledging its responsibilities under the FEHA, Air Canada attempted to hide behind excuses that are wholly unsupported by the evidence. Air Canada first claimed that it could not talk to Zemaitis because of an alleged letter from her worker's compensation attorney that all communication go through him, but failed to produce the letter. Further, Air Canada never even communicated with this attorney, despite its insistence that it was under orders to do so. Air Canada next claimed that it could not talk to Zemaitis because she was represented by the union, and that all communication had to go through the IBT. Yet, Zemaitis did not file her first grievance until a month after she initially attempted to return to work, and Air Canada management ignored her during this time period as well. And after the two grievances were filed, each was summarily denied by Cichy, with no explanation to Zemaitis or to the IBT. Thus, Air Canada willfully failed to communicate even with the parties it claimed were representing Zemaitis, consciously and outrageously disregarding Zemaitis's rights under the FEHA and causing her undue hardship.

In sum, this decision finds that the DFEH established, by clear and convincing evidence, that Air Canada willfully and consciously disregarded its obligations as a California employer in denying Zemaitis her rights to a timely and adequate interactive process and reasonable accommodations for her disability. Accordingly, this decision will order an administrative fine against Air Canada in the sum of $25,000, payable to the state's General Fund, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

C. Affirmative Relief

The DFEH asks that respondent be ordered to: cease and desist from discriminating against and refusing to offer reasonable accommodation to persons with disabilities; provide

training to all of its management personnel and employees on the FEHA's requirements; and post orders, as forms of affirmative relief, under the Act.

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subd. (a)(5).)

This decision finds that it is appropriate to order Air Canada to cease and desist from failing to reasonably accommodate employees with disabilities, and to engage in a prompt interactive process when it receives a request for reasonable accommodation. Air Canada will also be ordered to post a notice in all California business locations acknowledging its unlawful conduct toward Zemaitis (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B). In addition, this decision orders Air Canada to develop, implement, and disseminate a policy that advises California management and supervisors of their FEHA obligation to make reasonable accommodation for respondent employees' physical or mental disabilities and to engage in a timely, good faith, interactive process with respondent employees to determine what accommodations are appropriate. Finally, this decision orders Air Canada to provide training on that policy to supervisors and managers within California.

ORDER

1. Respondent Air Canada shall immediately cease and desist from failing to engage in a timely, good faith, interactive process, failing to provide reasonable accommodation, discriminating against employees on the basis of disability, and failing to take all reasonable steps to prevent discrimination from occurring under the Fair Employment and Housing Act.

2. Within 60 days of the effective date of this decision, Air Canada shall pay to complainant Caroline Messih-Zemaitis the amount of $102,737.60 in back pay. Interest shall accrue on this amount at the rate of 10 percent per year, compounded annually, from the date the earnings accrued until the date of payment.

3. Within 20 days, respondent Air Canada shall offer Caroline Messih-Zemaitis reinstatement to the first available position as a Customer Service Agent - Cargo or a substantially comparable position, together with all seniority, rank, status, and other terms and conditions and privileges of employment she would have enjoyed had she not been unlawfully denied reinstatement on September 13, 2007, and reinstate her for that position if she accepts the offer. Caroline Messih-Zemaitis has 10 days to accept or reject the offer.

4. Within 60 days of the effective date of this decision, respondent Air Canada and the Department of Fair Employment and Housing shall attempt to reach agreement on the amount owed complainant Caroline Messih-Zemaitis in post-hearing front pay, calculated

from February 16, 2010, through the date on which she accepts or refuses the offer of reinstatement made in compliance with section 3 of this Order. The amount shall be reduced by any wages or earnings actually earned by complainant in that period, and shall bear interest, calculated at the rate of 10 percent per year, running from the date the earnings accrued, and compounded annually, until the date of payment. The parties shall, within 70 days of the effective date of this decision, report the agreed amount to the Commission for its approval, or report their failure to agree. Respondent Air Canada shall pay the agreed amount within 10 days after the Commission approves it, and verify said payment to the Commission in writing. If respondent and the Department of Fair Employment and Housing do not reach an agreement, or the Commission does not approve, this element of the damages award shall be returned for further hearing. The Commission shall retain jurisdiction over this case for the purpose of determining, if the parties are unable to agree, the amount of front pay to be ordered.

5. Within 60 days of the effective date of this decision, Air Canada shall pay to complainant Caroline Messih-Zemaitis the amount of $19,720 in lost benefits. Interest shall accrue on this amount at the rate of 10 percent per year, compounded annually, running from the date of accrual to the date of payment.

6. Within 60 days of the effective date of this decision, Air Canada shall pay to complainant Caroline Messih-Zemaitis the amount of $125,000 in emotional distress damages. Interest shall accrue on this amount at the rate of 10 percent per year, compounded annually, running from the effective date of this decision to the date of payment.

7. Within 60 days of the effective date of this decision, Air Canada shall pay the amount of $25,000 as an administrative fine, payable to the state's General Fund. Interest shall accrue on this amount at the rate of 10 percent per year, compounded annually, running from the effective date of this decision to the date of payment.

8. Within 60 days of the effective date of this decision, Air Canada shall develop, implement, and disseminate a policy that advises California management and supervisors of their FEHA obligation to make reasonable accommodation for Air Canada employees' disabilities and to engage in a timely, good faith, interactive process with Air Canada employees to determine what accommodations are appropriate.

9. Within 90 days of the effective date of this decision, Air Canada's California management level employees and all California supervisors in the chain of command shall, at Air Canada's expense, attend a training program about Air Canada's reasonable accommodation policy ordered in section eight of this order, disability-based employment discrimination, reasonable accommodation, the interactive process and the procedures and remedies available under the Fair Employment and Housing Act.

10. Within 10 days of the effective date of this decision, Air Canada's president or other authorized representative of Air Canada shall complete, sign and post in all California business locations clear and legible copies of the notices conforming to Attachments A

and B. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

11. Within 100 days after the effective date of this decision, Air Canada shall in writing notify the Department of Fair Employment and Housing and the Commission of the nature of its compliance with sections two through ten of this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: March 29, 2011

_____

Ann M. Noel
Administrative Law Judge

ATTACHMENT A

NOTICE TO ALL AIR CANADA EMPLOYEES AND APPLICANTS

Posted by Order of the FAIR EMPLOYMENT AND HOUSING COMMISSION
An Agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Air Canada is liable for discriminating against an employee because of her disability, and for failing to engage in a good faith interactive process, to reasonably accommodate an employee, and to take all reasonable steps to prevent discrimination from occurring. (Gov. Code, § 12940, subds. (a), (k), (m) & (n).) (Dept. Fair Empl. & Hous. v. Air Canada (2011) No. 11-__.)

As a result of the violation, Air Canada has been ordered to post this notice and to take the following actions:

1. Cease and desist from violating employees' rights to discrimination-free employment, reasonable accommodation, and a good faith interactive process under the provisions of the Fair Employment and Housing Act.

2. Reinstate the employee or pay her front pay, and pay back pay, lost benefits and damages for emotional distress.

3. Pay the state's General Fund an administrative fine.

4. Develop, implement, and disseminate a reasonable accommodation policy for Air Canada employees' disabilities.

5. Provide training on that policy to its corporate president, directors and officers, current managers and supervisors currently working at Air Canada.

6. Post a statement of employees' rights and remedies regarding discrimination based on disability, reasonable accommodation and the interactive process and conduct training about these rights.

Dated: _____ By: _____
Authorized Representative for
Air Canada

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION OF DISABILITIES

Employees and applicants are entitled to be free from discrimination on the basis of an actual or perceived physical or mental disability and entitled to reasonable accommodation for that disability as allowed by law. A physical disability includes having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body's major systems and limits a major life activity. A mental disability includes having any mental or psychological disorder or condition that limits a major life activity. If, because of your actual or perceived disability, an employer:

- refuses to hire or promote you,
- fails to provide you reasonable accommodation that is not an undue hardship to your employer,
- fails to engage in a timely, good faith interactive process to determine reasonable accommodation,
- retaliates against you,
- terminates your employment, or
- otherwise discriminates against you in your terms and conditions of employment, that employer may have violated the Fair Employment and Housing Act.

If you feel that any of these illegal practices have happened to you, or that you have been retaliated against because you opposed these practices, you have one year to file a complaint with the state Department of Fair Employment and Housing (DFEH) at (800) 884-1684 or www.dfeh.ca.gov.

The DFEH will investigate your complaint. If the complaint has merit, the DFEH will attempt to resolve it. If no resolution is possible, the DFEH may prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and require your employer to reinstate you, to pay back wages and other out of pocket losses, damages for emotional injury, an administrative fine, and to give other appropriate relief. Alternately, you may retain your own attorney to take your case to court.

Dated: _____ By: _____

Authorized Representative for
Air Canada

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL BE POSTED INDEFINITELY, AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

DISSENT

"It is the purpose of th[e FEHA generally] to provide effective remedies that will eliminate . . . discriminatory practices." (Gov. Code, § 12920.) With respect to discrimination based on a physical disability specifically, the FEHA contains a "broad definition" of physical disability (Gov. Code, § 12926.1, subd. (b)), and the FEHA is intended to provide greater protection from disability discrimination than that provided under the federal Americans with Disabilities Act. (Gov. Code, § 12926.1, subd. (a).)

Notwithstanding the foregoing, there are limits to the reach of the FEHA. For example, the FEHA does not apply to all employers. (See Gov. Code, § 12926, subd. (d) [requiring an "employer" to employ five or more employees to be covered, and exempting non-profit religious organizations].) Of greater importance in the instant case, the FEHA is also pre-empted by federal law, "if the resolution of a [FEHA] claim depends upon the meaning of a collective-bargaining agreement . . . ." (*Lingle v. Norge Div. of Magic Chef, Inc.* (1988) 486 U.S. 399, 405-06 (footnote omitted).)[8]

The DFEH alleges four claims against Air Canada: Government Code sections 12940, subdivisions (n) ("fail[ure] to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations . . ."); (m) ("fail[ure] to make reasonable accommodation for the known physical . . . disability of an . . . employee"); (a) (discriminating against Zemaitis "because of [her] . . . physical disability . . . [by] discharge[ing her] from employment . . ."); and (k) ("fail[ure] to take all reasonable steps necessary to prevent discrimination . . ."). Because I conclude that all four claims are pre-empted by federal law, I respectfully dissent.

The Interactive Process Is Governed Solely by the CBA

In order for the DFEH to establish a violation of Government Code Section 12940, subdivision (n), it must prove that Air Canada "fail[ed] to engage in a timely, good faith, interactive process" with Zemaitis. (Gov. Code, § 12940, subd. (n).) The relevant "interactive process" for purposes of this action is defined solely by the terms of the CBA. CBA Article 16, entitled "Medical Disability Status," sets forth the process that governs in this case.

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[8] In *Hawaiian Airlines, Inc. v. Norris* (1994) 512 U.S. 246, the U.S. Supreme Court adopted the pre-emption standard it articulated in *Lingle* under the LMRA as the appropriate pre-emption standard for RLA cases. (*Id.* at p. 263).

The majority is quite critical not only of Air Canada's purported failure to engage in a timely, good faith, interactive process, but also the IBT's alleged failure to provide what the majority believes is appropriate assistance to Zemaitis. Yet the majority does not cite a single instance in which either Air Canada or the IBT violated the CBA. Absent a violation of the CBA, I can find no factual basis on which to conclude that Air Canada did not meet its Section 12940, subdivision (n), obligations.

It appears that the majority's real objection is to the interactive process itself, such as it is, as set forth in the CBA. Admittedly, the interactive process contemplated by the CBA likely would not meet anyone's definition of best practices for a California employer subject to the FEHA and not subject to a collective bargaining agreement. That said, it is not for the Commission to substitute its judgment for what constitutes a "timely, good faith, interactive process" when this issue has been specifically subjected to the collective bargaining process.

The U.S. Supreme Court has recognized that "[l]abor unions certainly balance the economic interests of some employees against the needs of the larger work force as they negotiate collective-bargain agreements and implement them on a daily basis." (*14 Penn Plaza LLC v. Pyett* (2009) 129 S. Ct. 1456, 1472.) It is certainly possible, if not likely, that the interactive process contemplated in the CBA was the result of negotiation and compromise. As the Court notes, however, "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands." (*Id.* at pp. 1472-73.)

Whether Zemaitis actually has sacrificed any rights remains unclear. The majority acknowledges that the CBA has a process for resolving disputes, regardless of its efficacy in this particular case. Moreover, Zemaitis may have rights under federal law, either the Americans with Disabilities Act[9] or applicable federal labor law.[10] Regardless of Zemaitis's remedies, because determining whether Air Canada engaged in a timely, good faith, interactive process requires an interpretation and application of the CBA, the DFEH's Section 12940, subdivision (n), claim is pre-empted.

What Constitutes a "Reasonable Accommodation" Is Determined Solely by the CBA

In order for the DFEH to establish a violation of Government Code Section 12940, subdivision (m), it must prove that Air Canada failed to provide Zemaitis with a "reasonable accommodation." (Gov. Code, § 12940, subd. (m).) The majority objects to the options Air

[9] Article 30.01 of the CBA expressly incorporates all protections afforded by Title VII of the Civil Rights Act of 1964. Whether this provision also incorporates the ADA, although unclear, would call for the interpretation of the CBA, thus providing another ground for finding pre-emption.

[10] *Pyett* discusses possible protections for union members under federal labor law.

Canada offered Zemaitis, even though the options offered were those provided for in the CBA. Instead, the majority believes that Air Canada should have done more. Applicable law, however, does not require this.

It is undisputed that if a 70 pound lifting requirement is an essential function of Zemaitis's job, she cannot do this. The majority holds that the 70 pound lifting requirement is not an essential function of Zemaitis's job. I disagree.

Once again, the CBA controls on this issue. Zemaitis's job description, as set forth in the CBA, specifically calls for a 70 pound lifting requirement. In my view, this is dispositive. The job description, as are all parts of the CBA, is subject to collective bargaining. For whatever reason, Air Canada and the IBT agreed that the 70 pound lifting requirement was a part of Zemaitis's job. It is not for me or the Commission to second guess this requirement. Moreover, even if I were to second guess this requirement, in order to do so, I would not only have to interpret the CBA, I would have to ignore it. Such analysis necessarily means that the claim is pre-empted.

The majority also places reliance on the fact that because of Zemaitis's seniority, she could have avoided ever having to work a shift in which she may have been required to lift, in fact, 70 pounds. The only basis for this finding, however, is the seniority system set forth in the CBA, which necessarily calls for an interpretation and application of the CBA to the facts of this case.

Admittedly, the set of reasonable accommodation options provided for in the CBA are limited. As with the interactive process, the reasonable accommodation options hardly meet a best practices standard for California employers subject to the FEHA and not subject to a collective bargaining agreement. In fact, absent the CBA, offering such limited reasonable accommodation options may in fact violate the FEHA. But in this case, we do have the CBA, and the parties specifically bargained for the options provided for in the CBA. Under these circumstances, I would hold that the DFEH's section 12940, subdivision (m), claim is pre-empted.

The Claims for Disability Discrimination and Failure to Prevent Disability Discrimination Are also Pre-empted

The DFEH also asserts claims under Government Code Section 12940, subdivision (a) (disability discrimination) and 12940, subdivision (k) (failure to prevent disability discrimination). In the context of this action, I find these two claims derivative of the section 12940, subdivision (n), and 12940, subdivision (m), claims. The issues in this case are whether Zemaitis can perform the essential functions of her job, with or without reasonable

accommodation, and whether the parties engaged in a timely, good faith, interactive process. As discussed above, the answers to these questions are governed solely by the CBA, and as such, the claims are pre-empted. Because the primary claims are pre-empted, I would also hold that the derivative claims are similarly pre-empted.

Conclusion

For the foregoing reasons, I would hold that each of the DFEH's claims against Air Canada is pre-empted and, therefore, I respectfully dissent.

STUART LEVITON